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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JEFFREY and STACY
EMERALD BENICE.

JEFFREY S. BENICE,

Appellant,

v.

STACY EMERALD BENICE,

Respondent.

G039745

(Super. Ct. No. 07D001362)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nancy A. Pollard, Judge. Appeal dismissed; motion for sanctions denied.

Jeffrey S. Benice, in pro. per., for Appellant.

Robert D. Bills, Jr., and Stacy Emerald Benice, in pro. per., for Respondent.

Jeffery S. Benice appeals from a temporary family support order in favor of his former wife, Stacy Emerald Benice¹ contending the \$26,588 per month support order constitutes an abuse of discretion. Stacy filed a motion to dismiss the appeal and request for sanctions against Jeffrey for having filed a frivolous appeal. Although no abuse of discretion has been shown, a subsequent support order has rendered Jeffrey's appeal moot. Accordingly, we dismiss the appeal. We deny Stacy's motion for sanctions.

FACTS

The record on appeal is sparse. It consists of an appellant's appendix (Cal. Rules of Court, rule 8.124) containing the order from which Jeffrey appeals, the notice of appeal, and his declaration filed in response to Stacy's order to show cause (OSC). The reporter's transcript covers the afternoon session of the hearing at which Stacy's counsel and Jeffrey presented argument, but does not include the morning session at which evidence was presented and admitted.²

Jeffrey and Stacy were married for seven and one-half years and have one child, a seven-year-old daughter. Jeffrey's declaration in opposition to Stacy's support request included his 2005 federal income tax return showing an adjusted gross income of \$785,339, and taxable income of \$332,698. Jeffrey stated that since separation he has paid Stacy between \$14,000 and \$15,000 a month in family support, and with other

¹ As is customary in family law proceedings, we refer to the parties by their first names, not out of disrespect, but to avoid confusion. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² Stacy did not file a respondent's appendix. (Cal. Rules of Court, rule 8.124(e)(3).) Instead, she filed a motion to augment the record. (Cal. Rules of Court, rule 8.155.) Items A, B, and C in her motion to augment are the proper subjects of augmentation—they are the petition for dissolution, her moving papers, and her income and expense declaration. The remaining 15 items (items D through S), are court documents filed *after* the order from which Jeffrey appeals was entered, accordingly, we deny the motion to augment as to those documents.

family expenses he paid directly (including the mortgage and private school tuition), he was paying support of \$18,400 per month.

Jeffrey explained he is an attorney in a solo practice, his 2006 taxes had not yet been filed, but he was preparing an amendment to his 2005 taxes that would reduce his adjusted gross income by at least \$200,000. He was currently having serious financial difficulties in his law practice—two major clients with over \$450,000 in outstanding bills had ceased business operations. He was in a dispute with the IRS over unpaid taxes of up to \$400,000. Jeffrey estimated his taxable income for 2007 would be in the \$350,000 to \$400,000 range.

At the hearing, the trial court ordered a forensic accounting of Jeffrey's law practice, and stated it would base a temporary support order on Jeffrey's 2005 adjusted gross income of \$785,000, or \$65,417 per month, with Jeffrey having a five percent time share of the couple's daughter. The court's minute order stated: "[C]ourt now makes orders without prejudice up or down to either party until the findings of the forensic accountant are admitted. Court orders as and for child support the sum of \$5,351 per month and as and for spousal support the sum of \$21,237 per month for a total support order of \$26,588 per month commencing 8/1/07 with credit for any payments made."

Shortly before oral argument in this appeal, Jeffrey advised this court he has been awarded full custody of the couple's child, and on October 30, 2008, the trial court entered a new support order. His support obligations have been significantly reduced retroactively. From July 2007 to December 2007, he is to pay Stacy \$17,090 per month in combined support; from January 2008 to August 2008, he is to pay \$17,499 per month in combined support; and from September 2008 on, he is to pay Stacy spousal support of \$13,466 per month. Jeffrey is entitled to reimbursement from Stacy of overpayments in support since the date of the order on appeal. Jeffrey requests that we dismiss his appeal as moot.

DISCUSSION

1. The Appeal is Moot

Jeffrey's motion to dismiss his appeal from the temporary support order³ correctly points out the new support order entered October 30, 2008, renders his appeal moot. "[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814.) However, Stacy's pending motion for sanctions remains to be resolved. Accordingly, we briefly address the merits of Jeffrey's appeal.

Jeffrey contends the October 2007 support order constituted an abuse of discretion because the court based the order on his 2005 income tax return and unreasonably rejected his representations concerning his current financial situation. The amount of temporary support rests within the sound discretion of the trial court. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283; *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 165.)

Jeffrey has not shown the October 2007 order constituted an abuse of discretion. Jeffrey does not dispute Stacy's representations regarding her expenses and financial circumstances. And substantial evidence supports the trial court's determination regarding his ability to pay, since the only financial document in evidence is Jeffrey's 2005 income tax return showing an adjusted gross income of \$785,000.

2. The Motion to Dismiss/Motion for Sanctions

In her motion to dismiss Jeffrey's appeal and impose monetary sanctions against him for having filed a frivolous appeal (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276), Stacy contends Jeffrey pursued this appeal solely to harass her and delay paying the court-ordered support. She complains Jeffrey failed to cooperate below

³ An order awarding temporary support is an appealable order. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 367-368.)

with the court ordered forensic accounting and has requested several unjustified continuances of the trial. She also asserts that despite there being no stay of the temporary support order, Jeffrey failed to pay the full amount ordered, but instead paid her only \$18,400 per month. Stacy complains that on appeal, Jeffrey missed deadlines for filing his opening brief (resulting in dismissal and later reinstatement of his appeal), made unreasonable requests to delay briefing on the appeal, and missed other deadlines including the deadline for filing opposition to her motion to dismiss and for sanctions.

In his opposition to Stacy's motion, Jeffrey asserts he complied with document disclosures pertaining to the forensic accounting (attaching to his declaration his detailed discovery responses). He explains trial continuances were sought (and granted) due to the extensive accounting work that had to be done. Jeffrey declares he sought to delay briefing on this appeal because he believed an upcoming hearing below might result in a ruling favorable to him that would make this appeal moot. (As it turned out, he was correct.) And, Jeffrey explains he missed the August 26, 2008, deadline for filing his opposition to Stacy's motion because he had erroneously believed the due date was September 2, 2008. The error and his ability to respond was further complicated when on August 29, 2008, Stacy was arrested and charged with felony child endangerment and their daughter was placed in his sole custody.

The standards for determining whether an appeal is frivolous are set forth in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*). There the court declared an appeal may be found frivolous and sanctions imposed when: (1) the appeal was prosecuted for an improper motive to harass the respondent or delay the effect of an adverse judgment; or (2) the appeal indisputably has no merit, i.e., when any reasonable attorney would agree the appeal is totally and completely without merit. (*Id.* at p. 650.)

Flaherty cautions that "any definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it

is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions.” (*Flaherty, supra*, 31 Cal.3d at p. 650.)

Although we conclude Jeffrey’s appeal lacks merit, we do not find it sufficiently egregious as to be considered frivolous or brought in bad faith. Whether Jeffrey was unjustifiably delaying further proceedings below is a matter best left for the trial court to decide. We note Jeffrey was relieved by this court of any defaults in his filings on appeal. And in view of the substantial amounts of support Jeffrey is paying to Stacy while the appeal has been pending, we are hard pressed to conclude he was simply trying to shirk his support obligations by pursuing this appeal. Accordingly, we deny the request for sanctions.

DISPOSITION

The appeal is dismissed as moot. Respondent’s motion for sanctions is denied. Respondent is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

O’LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.